dent existing legal rights, has no bearing on the principal case. It seems to be settled that a representation with reference to the legal effect of a written instrument, cannot be fraudulent in a legal sense: *Smither* v. *Calvart,* 44 Ind. 242, and cases cited. Fraud cannot be predicated upon such statements or representations.

Hence it seems impossible to admit that there is any fraud in this case, and without fraud, the decision cannot be upheld.

As bearing on the general rule given in the principal case the most recent case in point is the case of *Weinhard* v. *Summerville,* 46 Wash. 127, 89 Pac. 490, 13 L. R. A. N. S. 1089, which the court in the principal case does not seem to have considered in its decision. In that case, the court says: "The mere fact that the appellant wanted all mention of the lease omitted from the deed could not constitute fraud in the absence of some word or act deceiving or intending to deceive the respondent in regard to the contents of the deed." Here there was not only no act of deception but the plaintiff knew of the omission in the deed.

The only case cited in the principal case in support of the rule which it lays down is *Kilmer* v. *Smith,* 77 N. Y. 226. This case seems to be distinguishable from the principal case on the very points in which the court in the principal case admitted the two to differ. In *Kilmer* v. *Smith* provisions were inserted in the deed without the knowledge of the plaintiff grantee, who accepted the instrument and had it recorded without knowing that it contained such provisions. In the principal case the provisions objected to were put in the deed with the knowledge and with the consent of the plaintiff grantor. S. E. G.

THE CONSTRUCTION OF THE REPAIR CLAUSE IN A STREET RAILWAY CHARTER. —Whether a clause, in a charter, ordinance or statute, which imposes an obligation upon a street railway to repair the street, carries with it the obligation to repave, is a question upon which the authoirties are in conflict. In a recent Maryland case, the city, after repaving the entire street, brought suit against the railway company for the cost of the pavement between the tracks, and for two feet on either side, the area which the company was bound to repair. The court held that "to repair" did not include repavement, and dismissed the action. *United Rys. & Elec. Co.* v. *Mayor, etc. of Baltimore,* (Md. 1913) 88 Atl. 617.

It may be well to note here that the principal case involves only the question of repavement under the clause "to repair." It is distinguishable from cases in which circumstances outside the contract reveal the intention of the parties, where the question is one of pavement, rather than repavement, and where the franchise is assessed as property for the improvement. While probably not supported by a majority of the states, this last proposition has been the means of compelling the company to pay for its share of the improvement in a number of jurisdictions. *Chicago Cy. Ry. Co.* v. *City of Chicago,* 90 Ill. 573; *Chicago* v. *Baer,* 41 Ill. 306; *City of Columbus* v. *Col. St. Ry. Co.* 45 Oh. St. 98, 32 Am. & Eng R. R. Cas. 292; *Cy. of New Haven*

v. *Rd. Co.*, 38 Conn. 422. It is also well settled that a street railway company, bound "to repair," "to keep in repair," or "to keep in permanent repair," can not be compelled to pay its share of the paving of the street upon which it operates, as distinguished from paying the cost of repaving. *Chicago* v. *Sheldon*, 9 Wall. 50; *State* v. *Jacksonville St. Ry. Co.*, 29 Fla. 390; *Farrar* v. *St. Louis*, 80 Mo. 379; *Blair* v. *Chicago*, 201 U. S. 400.

As in other contracts, the intention of the parties governs the construction of the clause, and their acts often decide what was really meant. *Chicago* v. *Sheldon*, supra, *Kansas Cy.* v. *Corrigan Consol. St. Ry. Co.* 86 Mo. 67; *Collins* v. *Lavelle*, 44 Vt. 230.

Upon the question presented in the principal case, directly contrary views are taken. In New York a clause such as this has been construed to include the duty of repaving, when the municipality decides that it is necessary. The court reasons that the parties at the time they made the contract, foresaw that there would be progress, and with progress, the necessity of repavement, and that it would be taking too narrow a view to hold other than that the company took upon itself the duty to pay for its part of the street. *Conway* v. *Cy. of Rochester*, 157 N. Y. 33; *City of Rochester* v. *Roch. Ry. Co.*, 182 N. Y. 99; *Mayor, etc. of N. Y.* v. *H. B., M. & F. Ry. Co.*, 186 N. Y. 304, 78 N. E. 1072. Other propositions may be advanced to strengthen this position. A company, operating upon city streets, is bound to repair the area occupied by its tracks, without an express obligation to that effect. *Worster* v. *Forty-second St. etc. Ry. Co.*, 50 N. Y. 203; *Call* v. *Portsmouth, K. & Y. St. Ry.* 69 N. H. 562, 45 Atl. 405; *Maloney* v. *Natick & C. St. Ry. Co.*, 173 Mass. 587, 54 N. E. 349. The natural presumption is that the repair clause was intended to impose an obligation, rather than that it is declaratory of the common law liability. Moreover, in case there is any doubt as to the construction of the clause, all reasonable intendments are to be taken in favor of the city. *Canal Comm.* v. *People*, 5 Wend. 423, 459; *State* v. *Morgan*, 28 La. Ann. 482; *Storey* v *Woolverton*, 31 Mont. 346, 78 Pac. 589.

The courts which take the opposite view do so upon the ground that the word "repair" refers to a previously existing condition, and that the duty is continuous. They hold that "repair" in no sense means repave, and that it is contrary to the intention of the parties to hold that such a duty is imposed. *Morristown* v. *Ry. Cos.* 148 Pa. St. 87, 23 Atl. 1060; *Phila.* v. *Hestonville*, 177 Pa. St. 371; *Coast Line R. Co.* v. *Savannah*, 30 Fed. 646; *Dean* v. *Paterson*, 67 N. J. L. 199. In Pennsylvania, where the question seems to have been most litigated, an exception has been engrafted upon the general rule. After it had apparently been well settled in that jurisdiction that the company was not bound to repave, the Supreme Court, in *Reading* v. *Traction Co.*, 202 Pa. St. 571, decided that where the company had allowed its part of the pavement to fall into such a state of dilapidation that it presently would have to be repaired, and since such repairs must conform to the new pavement, it was but reasonable to require the company to make the entire improvement at that time. This departure from the general rule seems also to be a departure from the basic principle that contracts are to be construed according to the intention of the parties.

A. V. B. JR.